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No. 86-1889

In the Supreme Court of the United States

OCTOBER TERM, 1987

OSCAR DIAZ-ALBERTINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his right to challenge for possible bias the presence of a particular juror on his jury.

2. Whether a police search of petitioner's vehicle at a document-check roadblock violated the Fourth Amendment when petitioner consented orally and in writing to the search.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 772 F.2d 654.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1985. A petition for rehearing was denied on March 27, 1987 (Pet. App. A11). The petition for a writ of certiorari was filed on May 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Mexico, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to ten years' imprisonment and a special parole term of five years.

1. The district court held a pretrial hearing on petitioner's motion to suppress approximately 30 pounds of cocaine that was found in a vehicle he was driving. At that hearing, the government established that on January 30, 1984, New Mexico state police officers were stopping all cars at a roadblock near the town of Moriarty, New Mexico. Among the cars stopped was the station wagon petitioner was driving, in which petitioner's wife was riding as a passenger. The purpose of the roadblock was to inspect driver's licenses, license plates and registrations on all cars, and proof of insurance on vehicles registered in New Mexico. Pet. App. A2.

At the request of a police officer at the roadblock, petitioner produced his Florida driver's license and the registration form for the station wagon, which was registered in California. The registration form listed another person as the owner. A police officer then asked petitioner to park his car on the highway's median. After petitioner had done so, the police ran a computer check on the station wagon to determine if it was stolen. After the computer check proved negative, the officer asked petitioner if he would con-

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[1] Co-defendant Michelle Diaz-Albertini (petitioner's wife) was also convicted of possession of cocaine with intent to distribute it. The district court subsequently granted her motion for a new trial.

sent to a search of the vehicle. Petitioner consented orally and also signed a written consent form. Pet. App. A2.

During the search, one of the officers noticed that petitioner had difficulty in opening the tailgate of the car. The officer examined the tailgate and noticed that it felt heavy and that, when it was tapped, the tailgate sounded solid rather than hollow. The officer then lifted the corner of the plastic cover on the interior side of the tailgate and noticed some metal plates, which did not appear to be factory installed. The officer unscrewed the metal plates and discovered packages containing approximately 30 pounds of cocaine secreted behind the plates. Pet. App. A2.

The district court denied petitioner's motion to suppress the cocaine (Pet. App. A8). The court rejected petitioner's claims that the roadblock was pretextual and that petitioner's consent was the product of unlawful coercion (*ibid.*). The court found that petitioner made a knowing, intelligent, and voluntary consent to the search of his car (*id.* at A10).

2. On the morning of the first day of trial, the district court judge conducted *voir dire* examinations for a jury first in petitioner's case and afterwards for a jury in an unrelated criminal case. There was an overlap in the venire for the two juries. During the *voir dire* for petitioner's trial, the court asked whether any of the veniremen were closely associated with anyone in law enforcement. One of the veniremen, Paul Chavez, who was ultimately chosen as a juror in petitioner's case, remained silent during the questioning. Petitioner's attorney and his wife's attorney left the courtroom after their jury was selected. During the *voir dire* that same morning in the unrelated criminal case, Mr. Chavez stated in re-

sponse to a question posed by the court that he was closely acquainted with certain members of the state police. Pet. App. A3.

Following jury selection in the second case, the Federal Public Defender for the District of New Mexico, who was representing a defendant in that case, informed petitioner's counsel outside the courtroom that there was a juror on his panel who had stated, during the *voir dire* in the second case, that he was closely acquainted with the state police in Moriarty (Pet. App. A3-A4). The public defender also may have advised petitioner's counsel " 'to do something about it' " or " 'to get him off your jury' " (*id.* at A4). At that time, the jury in petitioner's case had been selected, but not yet sworn (*id.* at A5, A30-A31). After the conversation, petitioner's counsel made a note to himself to review the *voir dire* transcript "should we have a conviction" (*id.* at A4). Petitioner's counsel made no attempt to advise the court of the potential problem prior to trial (*ibid.*).

Following their convictions, petitioner and his wife moved for a new trial on the ground that juror Chavez was biased against them. At a hearing on that motion, the district court heard testimony from the public defender and petitioner's counsel concerning the conversation that took place between them after the second *voir dire*. The court also questioned juror Chavez. Pet. App. A4-A5.[2]

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[2] At the hearing, juror Chavez testified that he was the godfather of one of the children of a police officer who was at the roadblock. The officer in question was mentioned at trial but did not testify. Chavez also testified that because of the small size of Moriarty, New Mexico, he, like most members of the community, was acquainted with several other officers who were involved in the roadblock and in the subse-

Following the hearing, the district court denied petitioner's motion for a new trial due to juror bias. The court ruled that the motion was not timely filed and, in any event, lacked merit. The court concluded that petitioner's counsel had waived any claim concerning juror Chavez's failure to respond to the *voir dire* question posed in petitioner's case concerning his acquaintance with any member of the state police. The court stressed that petitioner's counsel had notice of the problem before the jury was sworn and made a tactical decision to postpone raising the matter until after conviction. The court granted the new trial motion made by petitioner's wife because there was no conclusive evidence that her attorney similarly had knowledge before trial of juror Chavez's possible bias. Pet. App. A5, A30-A31.

3. The court of appeals affirmed (Pet. App. A1-A10). The court held (*id.* at A6) that because petitioner's counsel was put on notice of potential juror bias prior to trial but did nothing about it, he had deliberately waived his right to raise the matter following petitioner's conviction. The court also ruled (*id.* at A7) that petitioner's motion pursuant to Fed. R. Crim. P. 33 for a new trial based on "newly discovered evidence" was out of time, because petitioner's counsel was aware of the problem before trial. The court of appeals also upheld (Pet. App. A8-A10) the search of petitioner's car and the seizure of the cocaine.

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quent search and arrest of petitioner and his wife. Pet. App. A5, A28-A31.

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the presence of juror Chavez on his jury deprived him of his right to an impartial jury because the juror did not reveal during *voir dire* that he was personally acquainted with several of the officers involved in petitioner's case. The court of appeals correctly rejected this claim.

Petitioner concedes (Pet. 10) that a defendant may waive any objection to the composition of the jury by failing to pursue the matter in a timely fashion. See *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 550 n.2 (1984). Petitioner contends (Pet. 10-11) that there was no proof of a waiver in this case because there was no "convincing evidence" that either he or his lawyer was aware before petitioner's trial of the possibility of juror bias. The district court, however, found otherwise based on the court's examination of the public defender and of petitioner's counsel during a post-conviction hearing. The district court found (Pet. App. A30-A31) that petitioner's counsel was aware of the possible juror bias prior to the time the jury was sworn and made a conscious, tactical decision to raise the matter only if a conviction should result. The court of appeals reviewed those factual findings and, like the district court, concluded (Pet. App. A5) that the record showed that petitioner, through his counsel, "purposefully and knowingly waived his right to object to the presence of the juror." The factual finding of waiver is fully supported both by the uncontradicted testimony of the public defender that she alerted petitioner's counsel and by the testimony of petitioner's counsel that he, in effect, decided to pursue the matter only if his client was ultimately

convicted (see *id.* at A4). Petitioner's factbound assertion that those findings were in error does not warrant this Court's review.[3]

2. Petitioner also argues (Pet. 14-24) that the court of appeals erred in upholding the district court's denial of petitioner's motion to suppress the cocaine that was seized from the station wagon. Petitioner's Fourth Amendment rights were not violated, however, and the cocaine was properly admitted into evidence.

a. Contrary to petitioner's assertion (Pet. 14-15), petitioner's Fourth Amendment rights were not violated by the initial roadblock stop of his vehicle. The roadblock was established to check driver's licenses, registration forms, and insurance papers. It was therefore a legitimate exercise of the State's authority to ensure safety on the road. No reasonable suspicion of criminal activity is necessary to maintain such a roadblock and no problem of pretext is pre-

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[3] Petitioner also asserts (Pet. 13-14) that the district court judge, who was present at both *voir dire* examinations, should have notified petitioner's counsel of juror Chavez's possible bias. That claim lacks merit. It is not reasonable to expect a judge, who (as in this case) may conduct multiple *voir dire* examinations in a single day, to ensure the consistency of an individual venireman's responses in all those examinations. For this reason, contrary to petitioner's suggestion (Pet. 13), the decision of the court of appeals in this case does not conflict with *United States* v. *Schiavo*, 504 F.2d 1, 6 (3d Cir.), cert. denied, 419 U.S. 1096 (1974), which stated only that a court must take "reasonable measures" to preserve the fairness of a trial. In any event, a defendant certainly cannot complain of the court's failure to notify him of possible juror bias where, as in this case, the defendant is otherwise alerted to the problem and makes a tactical decision not to raise it until after the jury's verdict.

sented because the roadblock stopped "all oncoming traffic." See *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557 (1976). Significantly, the district court heard testimony from petitioner and from the police at a pretrial hearing and specifically found that the police stop of petitioner's car was pursuant to a routine check of all incoming traffic, and was not pretextual (Pet. App. A8; IV Tr. 5-6). As the court of appeals held (Pet. App. A9), those findings were fully supported by the record. Petitioner's challenge to that factual finding merits no further review.[4]

b. The computer check by the state police of the station wagon's registration also did not violate petitioner's Fourth Amendment rights. The police had sufficient cause to perform the computer check after they learned that petitioner had a Florida driver's license and was driving a car that had California license plates, was registered in California, and was not owned by petitioner or anyone else present. The computer check did not result in petitioner's unlawful "arrest" (Pet. 18); petitioner was simply the subject of a legitimate, temporary stop that was justi-

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[4] Petitioner's contention (Pet. 15-16) that the roadblock stop was "illegitimate" because his vehicle had a California (and not New Mexico) license plate and because New Mexico state police officers had training on the subject of narcotics detection on the highway is unavailing. The authority of the state police to stop vehicles at a routine highway safety check is not limited to those vehicles with in-state license plates. Nor does the fact that police are generally trained to spot unlawful activity, including possession of illicit narcotics, render unlawful otherwise lawful routine police investigatory stops. See *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983).

fiable for its limited purposes. See *United States* v. *Sharpe*, 470 U.S. 675, 682-686 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109-111 (1977).

For this reason, petitioner is wrong in asserting (Pet. 16) that, regardless of the validity of his consent to the search of the station wagon, the search was the product of an unlawful detention. Unlike *Florida* v. *Royer*, 460 U.S. 491 (1983), upon which petitioner relies (Pet. 18-19), petitioner's detention was lawful in all respects. Hence, unlike *Royer* (see 460 U.S. at 507-508 (plurality opinion); *id.* at 509 (Brennan, J., concurring)), there was no initial police misconduct that could have tainted the subsequent consent and the seizure of the cocaine.

c. Finally, petitioner claims (Pet. 20-24) that his consent to the search was invalid because the police lacked any "reasonable or articulable suspicion" to justify seeking consent in the first instance and because petitioner's consent was in any event involuntary. Both grounds lack merit.

First, there is no threshold constitutional requirement that the police possess a "reasonable or articulable suspicion" prior to asking if an individual is willing to consent to a search. The Fourth Amendment requires only that the stop be lawful, which it was, and that the consent be voluntary.[5]

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[5] The support petitioner cites for the contrary view is inapposite. *United States* v. *McCaleb*, 552 F.2d 717, 720-721 (6th Cir. 1977), stands only for the proposition that when the government seeks to rely upon consent to justify the lawfulness of a search, the government has the burden of proving that the consent was voluntary and was not the fruit of an illegal arrest. The two state court cases upon which petitioner relies also do not remotely support his contention. The court in *Nakamoto* v. *Fasi*, 64 Hawaii 17, 22, 635 P.2d 946, 951

Second, both the court of appeals and the district court correctly rejected petitioner's claim that his consent was involuntary. Further review of petitioner's factbound allegation to the contrary is unwarranted. It is well settled that the voluntariness of consent in a specific case is a question of fact to be determined from the "totality of the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1945)). As the court of appeals noted (Pet. App. A10), the district court in this case "found that [petitioner] was an educated individual, fluent in English, and fully capable of understanding the terms and consequences of the consent to search form." The district court heard the testimony of both petitioner and the police officer, who testified that petitioner consented both orally and in writing; the court assessed their credibility; and the court concluded from the evidence before it that the consent had been voluntarily obtained (*ibid.*). The court of appeals reviewed those factual findings for clear error and likewise concluded (*ibid.*) "[t]hat there is no indication in the record that [petitioner's] will was overborne in any way by the police." The court of appeals further observed (*ibid.*) that the police were civil during the incident, that they made no threats (implied or expressed), and that the time between the initial taking of petitioner's driver's license and the consent to search was so short that

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(1981), held only that a state may not condition entry to a rock concert at a city-owned site upon submission to a search. In *Meadows* v. *State*, 266 Ark. 380, 602 S.W.2d 636 (1980), the court simply ruled that evidence of illegal drugs discovered during a search incident to an improper arrest is not admissible against the defendant.

there was no basis from which to infer that petitioner's consent was the product of duress.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Relying on the Tenth Circuit's prior decision in *United States* v. *Abbott*, 546 F.2d 883 (1977), petitioner argues in the alternative (Pet. 22-24) that his consent to the search, even if uncoerced, did not extend to the discovery of cocaine within the tailgate itself. Unlike in *Abbott*, however, petitioner was present throughout the search, including the search of the tailgate, and petitioner never indicated that his consent did not extend to the tailgate. Contrary to petitioner's claim (Pet. 23), moreover, the officer's careful examination of the tailgate is not analogous to destructive police activities such as "break[ing] into the plaster wall of [a] house." Petitioner's argument that the officer exceeded the scope of petitioner's consent is therefore wholly unpersuasive.

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